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IN THE SUPREME COURT OF MISSOURI

MAHIR MOHAMMAD, Petitioner/Relator,

v.

HON. JOAN L. MORIARTY, Respondent.

RESPONDENT'S BREIF FOR HONORABLE JOAN L. MORIARTY

Tanja C. Engelhardt #50033
Assistant Circuit Attorney
St. Louis Circuit Attorney's Office
1114 Market Street, Room 401
St. Louis, MO 63101
Telephone: 314-622-4941
Facsimile: 314-622-3369
engelhardtt@stlouisco.org

**Attorney for Respondent
Hon. Joan L. Moriarty**

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St. Louis Circuit Attorney's Office	1
1114 Market Street, Room 401	1
St. Louis, MO 63101	1
Telephone: 314-622-4941	1
Facsimile: 314-622-3369	1
engelhardtt@stlouiscao.org	1
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Statement of Facts

Relator was charged with one (1) count of Possession of a Controlled Substance—Cocaine Base, a Class C felony, on October 19, 2001 in the Circuit Court of the City of St. Louis in Cause Number 011-4089. A preliminary hearing was held on February 8, 2002, Relator's case was bound over and Relator was arraigned on the matter. (L.F. 5-6). The matter was called for plea on April 25, 2002 to division 18. The Hon. Joan L. Moriarty and an interpreter were present. The plea was continued by the Court to April 26, 2002 because Relator was intoxicated. (L.F. 5). On April 26, 2002, Relator pled guilty to one (1) count of Possession of a Controlled Substance—Cocaine Base. Relator pled guilty non-pursuant to the State's offer of one (1) year Suspended Execution of Sentence with two (2) years probation. A pre-sentence investigation was ordered and the sentencing was continued. (L.F. 4-5, 44). On November 15, 2002, Relator received a Suspended Imposition of Sentence with five (5) years probation. (L.F. 341-43).

Relator filed a Motion to Withdraw Guilty Plea on March 7, 2003 and requested a hearing on the matter. (L.F. 34-40). The State filed its Response In Opposition to Defendant's Motion to Withdraw Guilty Plea. (L.F. 31-33). Relator's Motion was called and heard on March 8, 2003. Relator then filed a Reply to the State's Pleading in Opposition. (L.F. 25-30). The Court issued an order denying Relator's Motion to Withdraw Guilty Plea on April 9, 2003. (L.F. 18-24). On April 21, 2003, Relator filed a Motion to Reconsider and the Court denied the Motion on July 21, 2003. (L.F. 10-17, 7-9).

Relator filed an appeal with the Missouri Court of Appeals for the Eastern District of Missouri on September 4, 2003. (L.F. 45-47). The Court of Appeals dismissed the appeal on April 6, 2004, stating that the appeal was premature and that a writ of mandamus was the correct procedure. Relator then filed a Writ of Mandamus with the Missouri Court of Appeals for the Eastern District of Missouri, and it was summarily denied on July 5, 2005. On August 8, 2005, Relator filed his Writ of Mandamus with this Court. On or about August 30, 2005, this Court commanded Respondent to vacate its order of July 21, 2003 denying Defendant's Motion to Withdraw its Guilty Plea and/or Motion for Reconsideration and sustain said motion or show cause why Respondent should not do so.

On September 28, 2005, Respondent filed a written Response to The Order to Show Cause. On October 31, 2005, Relator filed his brief with the Supreme Court of Missouri.

Points Relied On

- 1. A Writ of Mandamus is not appropriate on these facts because a writ of mandamus can only compel the exercise of a legal right and not a discretionary act by the trial court.**

State v Mummert, 887 S.W.2d 573, 576 (Mo. 1994).

State v Davis, 438 S.W.2d 232 (Mo. 1969)

- 2. The trial court did not abuse its discretion because denying the Petitioner's request to withdraw his guilty plea did not contravene the logic of the circumstances before the court, did not shock the sense of justice and did not indicate a lack of careful consideration.**

A. As a matter of law, there is no factual basis for the court to grant withdrawal of Relator's guilty plea because the record unambiguously reflects that the plea was made voluntarily and knowingly without assurances or promises of punishment, and because Relator does not meet the preponderance of the evidence standard needed to show that manifest injustice has resulted from the acceptance of the guilty plea.

B. Possible deportation consequences are a collateral matter and plea counsel cannot be found to be ineffective for failing to advise on collateral matters prior to a defendant's plea of guilty.

C. No evidence has been presented to support Relator's subsequent arguments that plea counsel affirmatively represented to Relator that he would not be deported as a result of his guilty plea. Because there was no

affirmative misrepresentation on the part of plea counsel, the trial court's denial of Relator's Motion to Withdraw Guilty Plea should be upheld.

D. Without waiving Respondent's previous arguments, even if Relator's plea counsel incorrectly advised him that he would not be deported, there is no evidence that plea counsel's advice was erroneous *at the time of the plea*.

State v. Taylor, 929 S.W.2d 209, 215 (Mo.banc 1996)

State v Clark, 926 S.W.2d 22, 25 (Mo. App. W.D. 1996)

Argument

I. A Writ of Mandamus is not appropriate because a writ of mandamus can compel only the exercise of a legal right and not a discretionary act by the trial court.

A writ of mandamus is not appropriate to establish a legal right, but only to compel performance of a right that already exists. State v Mummert, 887 S.W.2d 573, 576 (Mo. 1994). The purpose of a writ of mandamus is to execute, not adjudicate. Id. In the instant case, a mandamus writ is not appropriate because Relator does not have the legal right to withdraw his guilty plea. The power to set aside the judgment of conviction and to permit defendant to withdraw a plea of guilty is *discretionary with the trial court*, and its action should not be disturbed on appeal except for an abuse of such judicial discretion. State v Davis, 438 S.W.2d 232 (Mo. 1969) (Emphasis Added).

"[M]andamus will not lie to compel an act when its performance is discretionary." McDonald v City of Brentwood, 66 S.W.3d 46, 51 (Mo App E. D. 2001). While a mandamus writ is proper to guarantee that a petitioner receives all rights as he or she is entitled under the law, a writ is not appropriate when the petitioner does not agree with the trial court's decision. In the case at bar, Relator seeks to order the trial court to rule differently. A mandamus writ should not be granted when the decision to withdraw a guilty plea rests in the sound discretion of the trial court. In effect, Relator seeks, inappropriately, to use a mandamus writ to force a trial court to rule in a manner more to his liking.

II. The trial court did not abuse its discretion because denying the Petitioner's request to withdraw his guilty plea did not contravene the logic of the

circumstances before the court, did not shock the sense of justice and did not indicate a lack of careful consideration.

A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicates a lack of careful consideration. State v Taylor, 134 S.W.3d 21 (Mo.2004). The trial court did not abuse its discretion because (1) there is no factual basis for the court to grant withdrawal of Relator's guilty plea because the record unambiguously reflects that the plea was made voluntarily and knowingly without assurances or promises of punishment, (2) possible deportation consequences are a collateral matter and plea counsel cannot be found to be ineffective for failing to advise on collateral matters prior to a defendant's plea of guilty, (3) no evidence has been presented to support Relator's subsequent arguments that plea counsel affirmatively represented to Relator that he would not be deported as a result of his guilty plea and (4) without waiving Relator's previous arguments, if this Court were to believe that Relator's plea counsel incorrectly advised him that he would not be deported, there has been no evidence that plea counsel's advice was erroneous at the time of the plea.

A. As a matter of law, there is no factual basis for the court to grant withdrawal of Relator's guilty plea because the record unambiguously reflects that the plea was made voluntarily and knowingly without assurances or promises of punishment. Furthermore, Relator does not meet the preponderance of the evidence standard needed to show that manifest injustice has resulted from the acceptance of the guilty plea.

Rule 29.07(d) states that a motion to withdraw a plea of guilty may be made only before the sentence is imposed, or when the imposition of sentence is suspended, or following sentencing to correct a manifest injustice. A claim of ineffective assistance of counsel relative to a guilty plea comes within the realm of Rule 24.035, and would normally be inappropriate for a motion to withdraw a plea pursuant to Rule 29.07(d) if not brought within the time for filing a Rule 24.035 motion. State v. Norsworthy, 71 S.W.3d 610 (Mo.banc 2002). Here, however, the imposition of the sentence has been suspended, and the Rule 24.035 time limit has not begun to run.

It is within the discretion of the trial Court to permit a defendant to withdraw a guilty plea prior to sentencing. However, a defendant does not have an absolute right to withdraw a guilty plea. State v. Mandel, 837 S.W.2d 571, 573 (Mo.App. 1992). Such relief is reserved only for extraordinary circumstances that indicate manifest injustice, and these extraordinary circumstances include involuntariness, fraud, fear, and the holding out of false hopes. State v. Taylor, 929 S.W.2d 209, 215 (Mo.banc 1996). In the instant case, the record refutes any claim of these extraordinary circumstances.

In Scroggins v. State, the Court focused on the nature of the defendant's plea in determining whether there was manifest injustice present, and whether the plea of guilty was voluntary and made with a full understanding of the charges against the defendant. Scroggins v. State, 859 S.W.2d 704 (Mo.App. W.D. 1993). In Huffman v. State, the defendant attempted to withdraw his guilty plea through the manifest injustice mechanism by claiming that his plea was induced by misleading assurances of punishment by the prosecution and his counsel, and because he did not understand the charges against him.

Huffman v. State, 668 S.W.2d 255 (Mo. App. S. Dist. 1984). In Huffman, the Court looked to the record and determined that Defendant testified under questioning of the Court that he had not been promised anything in return for entering a plea of guilty, that he understood he could face the maximum sentence, that the prosecutor had correctly stated the facts to which he admitted, and that he entered his plea freely and voluntarily under no threats of coercion and found no manifest injustice. Defendant also stated unambiguously that he understood all matters and answered in the affirmative when the Court asked if he was guilty. Due to these factors, the Court rejected the Defendant's attempt to withdraw his guilty plea.

On April 26, 2002, the Court questioned Mahir Mohammad in a similar manner. When the Court asked Relator if "anyone made any promises or threats to induce you to plead guilty?" he said, "No." (Tr. 40). When the Court asked Relator if "anyone made any promises about the sentence you're to receive?" he said, "No." (Tr. 40). When the Court asked Relator if he understood that "no one can promise you what your sentence will be, and that any such promise is not binding on this court?" he said, "Yes." (Tr. 40). When the Court asked Relator if he understood that the "Court can impose any sentence permitted by law?" he said, "Yeah." (Tr. 40). When the Court asked Relator if there was any reason not to accept his plea of guilty, he said, "No." (Tr. 44). Finally, when the Court asked Relator how he pled, he said, "I am guilty." (Tr. 34).

As a matter of law, in order to withdraw his plea of guilty, Relator must show by a preponderance of the evidence that manifest injustice has resulted by acceptance of his plea. Scroggins v. State, 859 S.W.2d 704 (Mo.App. W.D. 1993). Instead, Relator offers

no evidence of this. Besides the voluntary nature of his plea shown above, Relator does not assert that he was affirmatively misled or misinformed by counsel regarding his sentence. When the Court asked Relator if he understood the range of punishment – “any combination of imprisonment and fine imposed within the ranges” – he said, “Yeah.” (Tr. 41). When the Court asked Relator if he was “satisfied with the services rendered to you by Mr. Emert (his defense attorney)”, he said, “Yes.” (Tr. 32). If there was any evidence that Relator was misled or misinformed by his counsel, one assumes Relator would have advised the Court at that time, or alternatively, at the motion to withdraw his plea but Relator did not inform the Court in either instance. Indeed the record proves to the contrary, that Relator received and was satisfied that he received effective assistance of counsel, and therefore falls far short of the preponderance of the evidence standard required to show manifest injustice.

As in Scroggins, here, Relator Mohammad voluntarily pleaded guilty. As in Huffman, here, the Relator understood the charges against him and stated that he had not been promised anything in return for entering a plea of guilty. He offers no evidence to support that he was affirmatively misled or misinformed by counsel, and does not show extraordinary circumstances such as fraud, fear, or the holding out of false hopes.

As a result, Relator has not sustained his burden of proving by a preponderance of the evidence that manifest injustice has occurred, and therefore, as a matter of law, Relator’s Motion to Withdraw Guilty plea was correctly denied by the trial court.

Relator argues that Relator stated that he was satisfied with Mr. Emert’s services, but that he was satisfied with his legal services because Relator believed “Mr. Emert’s knew what he was doing, was a competent attorney, and had addressed all of his concerns; kept

him out of jail and obtained a suspended imposition of sentence, which if Relator successfully completed his period of probation, the charges would be expunged from his record.” Defendant’s Brief pg 13. Relator’s arguments are flawed.

At the time of plea, Relator and the State did not have an agreement on the sentence Relator was to receive. Because no agreement existed, Relator pled non-pursuant to the state’s recommendation. (Tr. 40). Therefore, Relator was not aware of what sentence he would receive until the Judge ordered it. Moreover, Relator was aware that he was subject to the full range of punishment available. (Tr. 40 – 43). Relator cannot say that he was satisfied with the efforts of Mr. Emert on the basis that Relator received a suspended imposition of sentence because Relator was not aware of that sentence until the Judge imposed it. Questions regarding the effective assistance of counsel occur before Relator pled guilty. (Tr. 32).

In addition, Relator argues that possible deportation issues represent manifest injustice because Relator is the sole provider for his family. This argument is misguided. If defendant's plea of guilty was voluntary and made with understanding of charges against him, there can be no manifest injustice inherent in plea. State v Pendleton, 910 S.W.2d 268 (Mo App W.D. 1995). Here, possible consequences to his family do not relate to whether Relator understands the charges against him. Certainly, all families suffer when loved ones are convicted. Therefore, this Court should not consider this argument when deciding whether Defendant should be allowed to withdraw his guilty plea.

B. Possible deportation consequences are a collateral matter and plea counsel cannot be ineffective for failing to advise on collateral matters prior to a defendant's plea of guilty.

Neither the trial court nor trial counsel have an obligation to inform a defendant of the collateral consequences of a guilty plea. Collateral matters include potential consequences of violating probation, parole eligibility, and the fact that conviction could be used at a later trial for impeachment purposes. Barmore v. State, 117 S.W.3d 113, 115 (Mo.App. E.D. 2003); Reynolds v. State, 994 S.W.2d 944, 946 (Mo. Banc 1999); State v. Abernathy, 764 S.W.2d 514, 516 (Mo.App. S.D. 1989). Counsel has no duty to a criminal defendant to initiate advice on collateral matters, absent exceptional circumstances. In fact, there is no Missouri precedent or law which demands that a criminal defendant be advised of collateral consequences before a guilty plea will be upheld. State v. Abernathy, 764 S.W. 2d 514, 516 (Mo.App. S.D. 1989), *citing* McIntosh v. State, 627 S.W.2d 652, 655 (Mo.App. 1981). Missouri courts have held that possible deportation is a collateral matter and that counsel has no affirmative duty to advise a criminal defendant of the potential deportation consequences. State v. Hasnan, 806 S.W.2d 54 (Mo.App.W.D. 1991), State v. Clark, 926 S.W.2d 22, 25 (Mo. App. W.D. 1996).

In State v. Hasnan, the defendant pled *pro se* to misdemeanor passing bad checks and received probation. At the time of the plea, the court did not advise Defendant of potential deportation issues. The Court of Appeals held that deportation proceedings are a collateral consequence of a guilty plea, and therefore, need not be disclosed to a defendant. 806 S.W.2d 54, 55 (Mo.App.W.D. 1991).

Likewise, in State v. Clark, Defendant pled guilty to Possession of a Controlled Substance and sought to withdraw his guilty plea after the commencement of deportation proceedings. The Court held that “later deportation proceedings are a ‘collateral’ result of a guilty plea.” 926 S.W.2d 22, 25 (Mo. App. W.D. 1996), *citing* Reece v. State, 852 S.W.2d 877, 878-79 (Mo.App. 1993). Both Hasnan and Clark ruled that deportation matters are collateral and that neither the court nor defense counsel were required to apprise defendant of such matters.

Relator’s first motion to the trial court averred that plea counsel did not advise Relator of the possible deportation consequences. Plea counsel had no duty to advise Relator of this collateral consequence of his guilty plea, and therefore, was not ineffective. The trial court was correct in denying Relator’s Motion to Withdraw Guilty Plea.

C. No evidence has been presented to support Relator’s subsequent arguments that plea counsel affirmatively represented to Relator that he would not be deported as a result of his guilty plea. Because there was no affirmative misrepresentation on the part of plea counsel, the trial court’s denial of Relator’s Motion to Withdraw Guilty Plea should be upheld.

After the State filed a Response to Relator’s Motion to Withdraw Guilty plea and arguments were heard, Relator changed his argument to allege that plea counsel did not merely fail to advise, but rather *incorrectly* advised Relator of possible deportation consequences. While the Courts have held that an affirmative misrepresentation of collateral consequences can be considered ineffective assistance of counsel, there is no

evidence that a misrepresentation was made in this case. U.S. v. Cuoto, 311 F.3d 179 (2nd Cir. 2002); Redeemer v. State, 979 S.W.2d 565, 572, (Mo.App. W.D. 1999).

In U.S. v. Cuoto, defendant was a non-resident alien who had been charged with the federal offense of bribery and conspiracy to commit bribery of an INS official. Defendant had conversations with counsel regarding possible deportation consequences, and her counsel *assured* her that he could deal with her immigration issues after the plea. Defense counsel *told* Defendant that there were many things he could do to prevent her from being deported when in fact, her conviction was considered an “aggravated felony” under 8 U.S.C. § 1101(a)(43) and she was subject to certain deportation. Here, the Court held that the affirmative misrepresentation by defense counsel amounted to ineffective assistance of counsel and allowed Defendant to withdraw her guilty plea. Cuoto, 311 F.3d 179, 188 (2nd Cir. 2002.) (Emphasis Added). Similarly, in Redeemer v. State, 979 S.W.2d 565, 572, (Mo.App. W.D. 1999), the court distinguished counsel’s failure to advise from incorrectly advising a client of collateral consequences of a guilty plea. There, the Court held that only where a defendant asks his counsel about a collateral consequence and counsel misinforms the defendant about that issue, will the representation rise to the level of ineffective assistance of counsel.

The instant case differs from both Cuoto and Redeemer in that Relator presented no evidence that plea counsel affirmatively represented to Relator that he would not be deported as a result of his guilty plea. In his Writ of Mandamus, Relator avers that plea counsel misled Relator “by choosing not to inform him” that pleading guilty would negatively affect his immigration status. The record contains no facts which prove that plea

counsel incorrectly advised him of deportation consequences. Furthermore, no evidence was presented at the hearing on Relator's Motion to Withdraw Guilty Plea. If Relator had evidence of an affirmative misrepresentation, he would have presented it. Relator's claims that plea counsel affirmatively misrepresented the deportation consequences are simply not supported by the evidence and Relator's Motion to Withdraw Guilty Plea was properly denied.

D. Without waiving Respondent's previous arguments, if this Court were to believe that Relator's plea counsel incorrectly advised him that he would not be deported, there has simply been no evidence that plea counsel's advice was erroneous *at the time of the plea*.

Relator presented no evidence that a state-level possession of controlled substance conviction was an offense that would result in certain deportation *at the time of the plea* on April 25, 2002. In fact, it wasn't until the decision in In re Yanez-Garcia, 23 I & N Dec. 390, 396-397 (BIA 2002) that the Board of Immigration decided that a state-level felony conviction for possession of a controlled substance would be considered an "aggravated felony" for purposes of deportation. Although the 8th Circuit had previously held that a state-level possession was an aggravated felony in U.S. v. Giones-Mata, 116 F.3d 308, 309-310 (8th Cir. 1997), that application had not been *adopted* by the Board of Immigration—the deporting agency—until May 13, 2002 in In re Yanez. Since Relator pled guilty on April 26, 2002, more than two weeks prior to the decision in In re Yanez, plea counsel could not have known of the impending change in interpretation and therefore, cannot be found to be ineffective.

Conclusion

It is within the trial court's discretion to allow Relator to withdraw a guilty plea. Mummert, 887 S.W.2d at 576. Absent an abuse of discretion, a decision by the trial court should not be disturbed. Davis, 438 S.W.2d 232. In the instant case, Relator has not shown that the trial court abused its discretion when it denied Relator's Motion to Withdraw a Guilty Plea on April 9, 2003 because (1) Relator's guilty plea was made voluntarily and knowingly without assurances or promises of punishment; (2) possible deportation consequences are a collateral matter and plea counsel cannot be found to be ineffective for failing to advise on collateral matters prior to a defendant's plea of guilty; (3) no evidence has been presented to support Relator's subsequent arguments that plea counsel affirmatively represented to Relator that he would not be deported as a result of his guilty plea and (4) without waiving Relator's previous arguments, if this Court were to believe that Relator's plea counsel incorrectly advised him that he would not be deported, there has been no evidence that plea counsel's advice was erroneous at the time of the plea. Since the trial court properly acted within its discretion, its order denying Relator's Motion to Withdraw Guilty Plea should not be disturbed.

WHEREFORE, the trial court should not be ordered to allow Relator to withdraw his guilty plea.

Respectfully submitted,

Tanja C. Engelhardt #50033
Assistant Circuit Attorney

Certificate of Service

A copy of the foregoing was mailed by first class mail, postage prepaid on this 18th day of November, 2005 to:

Edgar E. Lim
8000 Bonhomme Ave., Ste. 215
St. Louis, MO 63105

Hon. Joan L. Moriarty
Civil Courts Building
10 N. Tucker
St. Louis, MO 63101

Tanja C. Engelhardt
Assistant Circuit Attorney

Certification Pursuant to Rule 84.06(c)

I do hereby certify that the above brief complies with Rule 84.06(c) in that it includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 4, 288 words according to the Word Count function of Microsoft Word.

In addition, I hereby certify that the disk I have enclosed has been scanned for viruses and is virus free.

Tanja C. Engelhardt
Assistant Circuit Attorney